Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
Request for Review of Decision of Universal Service Administrator by Global Crossing Bandwidth, Inc.	)	USAC Audit Report No. CR2005CP007

APPLICATION FOR REVIEW

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Pursuant to Section 1.115 of the Commission's rules,[1] Global Crossing Bandwidth, Inc. ("GCB") seeks review by the full Commission of the order adopted by the Wireline Competition Bureau ("Bureau") on August 17, 2009 in the above-captioned proceeding.[2] The *Bureau Order* denies GCB's request for review of a decision by the Universal Service Administrative Company ("USAC") arising from an audit report issued in April 2007, and amended in May 2007 ("USAC Audit Report").[3] The USAC Audit Report imposed nearly $5.6 million in additional universal service contribution obligations on GCB for the 2004 calendar year because some of GCB's reseller customers did not meet their own contribution obligations.

As explained herein, the *Bureau Order* rubber-stamped the USAC Audit Report even though it is inconsistent with the Administrative Procedure Act ("APA"), the Communications Act, the Commission's rules, and the Due Process Clause of the Fifth Amendment to the

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[1] 47 C.F.R. § 1.115.

[2] *See Federal-State Joint Board on Universal Service, Request for Review of Decision of the Universal Service Administrator by Global Crossing Bandwidth, Inc.*, Order, CC Docket No. 96-45, DA 09-1821 (rel. Aug. 17, 2009) ("*Bureau Order*").

[3] *See* Independent Auditor's Report of Global Crossing Bandwidth, Inc., USAC Audit No. CR2005CP007 (Apr. 23, 2007) ("USAC Audit Report"), amended May 4, 2007.

Constitution. The Commission should vacate the *Bureau Order* and the erroneous audit findings and invoices underlying it.

INTRODUCTION AND SUMMARY

Under the APA and the Commission's rules, the Bureau has a duty to conduct a *de novo* review of any USAC action that is the subject of a petition for review. The *Bureau Order* abdicates this responsibility, failing to conduct any meaningful review of the USAC Audit Report or the evidence submitted by GCB on the record. While the *Bureau Order* is erroneous in several different respects, two overarching defects stand out.

First, ***there is no basis for finding GCB liable*** for violating the Commission's rules based on its revenue reporting for calendar year 2004. In reviewing GCB's 2005 FCC Form 499-A filings, USAC held GCB to a standard found nowhere in the Commission's rules or even the then-applicable instructions for completing FCC Form 499-A. GCB's only obligation was to adopt procedures to support a "reasonable expectation" that any wholesale customers it treated as resellers actually would resell telecommunications service, and accordingly would contribute directly to the universal service support mechanisms on the basis of revenues from those resold telecommunications services. GCB faithfully discharged that duty by compiling detailed information confirming its wholesale customers' status as resellers. Although GCB *reasonably believed* the customers at issue were resellers with an attendant duty to contribute to universal service, USAC and the Bureau refused to consider GCB's evidence and retroactively imposed bright-line requirements that did not exist in 2005. Because USAC and the Bureau applied the wrong standard, they had no legitimate basis for finding GCB liable for any rule violations.

Second, even if GCB somehow should have anticipated that some customers treated as resellers would not contribute directly to universal service, ***there is no factual or legal basis for***

shifting those customers' contribution obligations to GCB as a remedy. USAC and the Bureau failed to recognize that whether a wholesale customer *actually contributes* to the universal service fund ("USF") says nothing about whether that customer was properly classified as a reseller. Nonpayment *could* mean the customer was a provider of information services that GCB should have treated as an end user, but, at least as likely, the customer could have been a *bona fide* reseller that simply failed to honor its duty to contribute based on its end-user telecommunications revenues. USAC and the Bureau completely ignored this pivotal distinction and in turn failed to recognize that GCB cannot be held vicariously liable for a wholesale customer's failure to pay USF contributions unless that customer *actually operated* as an end user rather than reseller (and thus was exempt from contributing based on its retail revenues). USAC never even considered that crucial question of fact, despite GCB's submission of detailed evidence supporting the classification of the wholesale customers at issue as resellers.

Because there was no basis for finding GCB in violation of any Commission rules, and in any event there was no basis for holding it vicariously liable for its wholesale customers' contribution obligations, the Commission should vacate the *Bureau Order* and the underlying USAC Audit Report.

BACKGROUND

A. Legal Background

Carrier Contribution Obligations Under Section 254(d) of the Act. Section 254(d) of the Communications Act, as amended (the "Act"), provides that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis," to the universal service support mechanisms.[4] Thus, as a statutory

[4] 47 U.S.C. § 254(d).

matter, resale carriers *must* contribute to the fund. This obligation is also reflected in the Commission's rules, which provide that "[e]ntities that provide interstate telecommunications to the public . . . for a fee . . . *must* contribute to the universal service support mechanisms."[5] The Commission specifically declined to exempt resellers from this requirement.[6]

The "Carrier's Carrier" Exception. The fact that resellers contribute directly to universal service based on their end user revenues would result in "double counting" if underlying wholesale carriers were required to contribute based on their sale of interstate or international telecommunications services to resale carriers. The Commission accordingly exempted carriers from contributing based on the provision of wholesale telecommunications services for resale.[7] While this "carrier's carrier" exception applies to the sale of telecommunications services to resale carriers, the sale of telecommunications as an input to an information service is subject to assessment, because information service providers are treated as "end users" under the Commission's rules.[8]

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[5] 47 C.F.R. § 54.706(a) (emphasis added).

[6] *See Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, at ¶ 787 (1997) ("*Universal Service First Report and Order*") ("We . . . find no reason to exempt from contribution any of the broad classes of telecommunications carriers that provide interstate telecommunications services, including . . . resellers . . . .").

[7] *See* 47 C.F.R. § 54.706; *Universal Service First Report and Order* ¶ 844.

[8] *See, e.g., Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd 2631 (1988). This treatment of information services providers is reflected in the Instructions to FCC Form 499-A at 18 (2005) (excluding from definition of "reseller" providers of non-telecommunications services and treating non-reseller telecommunications revenues as end-user revenues).

FCC Form 457. In 1997, the Commission adopted FCC Form 457—the precursor to FCC Form 499-A—to collect certain revenue data from regulated telecommunications carriers.[9] Notably, FCC Form 457 implemented the "carrier's carrier" exception by separating reseller and end-user revenues.[10] The instructions to FCC Form 457 ("1997 Instructions") defined a "reseller" as a telecommunications service provider that: (i) incorporates purchased telecommunications services into its own offerings; and (ii) can reasonably be expected to contribute to support universal service based on revenues from those offerings.[11] Those instructions further provided that "an underlying carrier should have documented procedures to ensure that it reports as revenues from resellers only revenues from entities that reasonably would be expected to contribute to support universal service."[12] In other words, the wholesale provider must reasonably expect that its customer "will, in fact, resell service."[13] Nothing in the instructions remotely suggests that wholesale providers must assess whether *bona fide* resellers actually will comply with their contribution obligations.

Creation of FCC Form 499-A. In 1999, the Commission simplified its filing requirements for communications service providers by replacing several different—but largely duplicative—forms with one consolidated form, the Telecommunications Reporting Worksheet, or FCC Form 499-A.[14] In March 2000, the Bureau released a revised version of FCC Form 499-

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[9] *See Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400, at App. A (1997) ("*Second Order on Reconsideration*").

[10] Instructions to FCC Form 457 at 13 (1997) ("1997 Instructions").

[11] *Id.* at 18; *see also Second Order on Reconsideration* at App. A.

[12] 1997 Instructions at 18.

[13] *Id.* at 11.

[14] *See 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American*

A and its associated instructions ("2000 Instructions").[15] Like the 1997 Instructions, the 2000 Instructions provided that each wholesale carrier should have "documented procedures to ensure that it reports as revenues from resellers only revenues from entities that reasonably would be expected to contribute to support universal service," including maintaining a record of the legal name, address, and contact name and telephone number of each reseller.[16] The 2000 Instructions further provided that if a wholesale carrier lacked an "independent reason to know that the entity [would], in fact, resell service and contribute to the federal universal service support mechanisms," that carrier should obtain a signed statement to that effect.[17]

The 2005 Instructions to FCC Form 499-A. The instructions to FCC Form 499-A evolved gradually from 2000 through 2005, with minor changes to their substance. With respect to the treatment of wholesale revenues, however, the fundamental premise of the 2000 Instructions remained unchanged, including in the 2005 instructions to FCC Form 499-A ("2005 Instructions") applicable to the USAC audit at issue here. In particular, wholesale carriers were given broad discretion to adopt procedures designed to ensure that customers were not incorrectly classified as resellers. Apart from the requirement to maintain a record of each reseller's contact information and Filer 499 ID,[18] the 2005 Instructions left it entirely to

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Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Report and Order, 14 FCC Rcd 16602, at ¶ 8 (1999).

[15] *See Public Notice: Common Carrier Bureau Announces Release of Telecommunications Reporting Worksheet (FCC Form 499-A) for April 1, 2000 Filing by All Telecommunications Carriers*, DA 00-471 (Mar. 1, 2000).

[16] 2000 Instructions at 13. As was the case with the 1997 Instructions, the 2000 Instructions make clear that the application of the "reasonable expectation" standard turns on whether an entity could be expected to contribute "based on revenues from [its] offerings." *Id.*

[17] *Id.*

[18] 2005 Instructions at 18.

wholesale providers to determine how to validate a reseller's carrier status, which in turn would establish whether that entity was likely to contribute directly to universal service.[19]

The 2007 Instructions to FCC Form 499-A. In contrast to the open-ended, discretionary standard established by the 2005 Instructions, the 2007 instructions to FCC Form 499-A ("2007 Instructions") established a bright-line standard consisting of three prongs. This new test required wholesale carriers to obtain, as before, the reseller's Filer 499 ID, legal name, address, and contact name and telephone number, but now made it mandatory to: (i) obtain an "annual certification by the reseller," in the specified form; and (ii) provide "evidence of the filer's use of the FCC's website to validate the current contributor status of the reseller."[20] The 2007 Instructions thus reflected a significant departure from the 2005 Instructions. Exhibit A illustrates the differences between the two sets of instructions.

B. Procedural Background

GCB. GCB is the wholesale arm of the Global Crossing North America family of companies. Traditionally, GCB's customers were other interexchange carriers to which GCB offered telecommunications services suitable for resale, although GCB also sold telecommunications to some providers of information services treated as end users under the Commission's rules. During the time period at issue (and since that time), GCB compiled significant evidence regarding it customers' regulatory status to determine the appropriate allocation of USF contribution obligations. Among other things, GCB compiled information

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[19] *Id.* Consistent with previous incarnations of the FCC Form 499-A instructions, the 2005 Instructions focus on whether the wholesale carrier had a reasonable expectation that reseller customers would contribute based on "revenues from such [resold] offerings," while clarifying that the relevant offerings are those "provided to end users." *Id.*

[20] 2007 Instructions at 18-19.

from service contracts and its customers' websites, and in many cases it obtained certifications that customers operated as resale carriers.[21]

The USAC Audit. On September 16, 2005, USAC commenced an audit in response to the filing of GCB's 2005 FCC Form 499-A, which pertains to revenues from the 2004 calendar year.[22] As part of that audit, and in response to USAC's request,[23] GCB provided: (i) a list of customers considered to be resellers and revenues earned from each such reseller for 2004 and 2005; (ii) the Filer ID number, legal name, address, and contact name and telephone number of each such reseller; and (iii) detailed documentation supporting its determinations that each such customer actually was a reseller as defined in the 2005 Instructions.

USAC's Internal Audit Division ("IAD") subsequently found that a subset of GCB's reseller customers had not contributed to the USF, and that GCB had not included revenues from these customers in its own contribution base.[24] In identifying the purported "cause" of this state of affairs, IAD noted that "[a]lthough [GCB] received signed USF certifications from its resellers, many of the forms were outdated and not kept current annually."[25] IAD recommended that GCB refile its 2005 FCC Form 499-A, treating the revenues from customers that, on retrospective review, did not contribute to the federal support mechanisms as end-user revenues

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[21] *See* USAC Audit Report at 4, 7 (noting that "Global Crossing received signed USF certifications from its resellers" and provided to USAC information beyond that requested by USAC's information request, including contract provisions, product schedules, and similar data).

[22] *See* Letter from Wayne M. Scott, Vice President, Internal Audit Division, USAC, to Teresa Reff, Global Crossing (Sep. 16, 2005).

[23] *See id.* at Exh. B, Item 9.

[24] *See* USAC Audit Report at 4.

[25] *Id.*

without inquiry into the nature of the services that these entities actually provided (*i.e.*, whether those customers actually were resellers).[26]

GCB challenged this recommendation and noted that: (i) the 2005 Instructions did not require GCB to collect reseller certifications at all, much less annual certifications, or to meet other specific obligations only required later in the 2007 Instructions;[27] (ii) IAD's attempt to require such certifications was impermissibly retroactive;[28] and (iii) even if the 2005 Instructions *had* required the collection of reseller certifications, GCB's failure to collect such certifications would not, in and of itself, support the conclusions that GCB's procedures were inadequate, that GCB's customers were not resellers, or that the contribution obligations of GCB's non-contributing customers should be shifted to GCB.[29] IAD failed to address these points, and USAC Management merely responded with the conclusory (and illogical) assertion that GCB's procedures were inadequate because "[c]ontract provisions and product descriptions cannot provide insight into a company's business plan," and such insight is "vital in determining the contribution expectations of that customer."[30]

The Bureau Order. On June 22, 2007, GCB filed a request for review of the USAC Audit Report. Consistent with its audit response, GCB argued that there was no basis for finding GCB's reporting procedures to be inadequate or, in any event, for shifting its customers' contribution obligations to GCB absent a finding that these customers were not *bona fide* resellers. The Bureau denied the petition, without meaningful explanation of why GCB's

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[26] *Id.* at 5.

[27] *Id.* at 8.

[28] *Id.*

[29] *Id.* at 5-7.

[30] *Id.* at 10.

procedures were inadequate, without conducting any inquiry into whether the customers at issue actually were resellers, and apparently without conducting any *de novo* review of the record.

ARGUMENT

I. EVEN UNDER THE 2005 INSTRUCTIONS, THE BUREAU ERRED IN UPHOLDING USAC'S IMPOSITION OF LIABILITY

The *Bureau Order* repeats all of USAC's errors in upholding its determination that GCB is liable for unpaid USF contributions for the 2004 calendar year. Even assuming that the 2005 Instructions (as opposed to the Commission's rules) were binding,[31] GCB complied with those Instructions. USAC and the Bureau erred in substituting—for the statute, the rules, and the Instructions as they are actually written—a conclusive presumption that a wholesale customer's nonpayment of USF contributions makes the underlying carrier *per se* liable. To the extent that USAC and the Bureau considered the record evidence at all, they appear to have dismissed it as irrelevant based on instructions that appeared in *2007*, rather than the instructions that actually were in place in *2005*. Alternatively, if USAC and the Bureau correctly construed the substance of the 2005 Instructions, then those Instructions were promulgated in clear violation of the APA because they were adopted outside the mandatory notice-and-comment rulemaking procedures.

A. Nothing in the 2005 Instructions Required GCB To Rely on any Particular Type of Evidence Regarding Its Wholesale Customers' Status as Contributing Resale Carriers.

The 2005 Instructions afforded wholesale carriers broad discretion in determining whether their wholesale customers would operate as resellers (as opposed to end users), requiring only that carriers adopt procedures to justify a "reasonable expectation" that a wholesale

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[31] In fact, the Instructions were not binding, and are not even entitled to any particular deference as interpretations of the Commission's rules. *See infra* Section I.C. When agency regulations merely parrot the statute (as sections 54.706 and 54.708 of the Commission's rules do), administrative interpretations of those regulations are not entitled to any particular weight. *See Gonzalez v. Oregon*, 546 U.S. 243, 257 (2006).

customer would resell telecommunications service and contribute to the USF accordingly. GCB's procedures were consistent with this flexible standard. Specifically: (i) GCB compiled records of Filer IDs and contact information for its wholesale customers; (ii) GCB compiled detailed evidence demonstrating that it also had independent reason to know that each such customer was a reseller based on GCB's service contract, the customer's website, and other factors confirming the customer's carrier status;[32] and (iii) while such "independent reason[s]" obviated the need for certifications under the 2005 Instructions, GCB nevertheless obtained certifications from many such resellers,[33] as acknowledged by USAC itself.[34] Nothing more was required by the Commission's rules,[35] and, while the 2005 Instructions could not have imposed any additional legal obligations,[36] those instructions required nothing further in any event.

The core defect in the *Bureau Order* (which flows directly from the USAC Audit Report) is its attempt to shift the focus from whether GCB *reasonably expected* its wholesale customers

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[32] While USAC asserted that such "[c]ontract provisions and product descriptions cannot provide insight into a company's business plan," USAC Audit Report at 10, these materials actually are prime sources of information relevant to whether the wholesale customer intends to offer resold telecommunications services or information services. Indeed, contract provisions and product descriptions are far more informative than mere contact information—the only specific item identified in the 2005 Instructions.

[33] 2005 Instructions at 18. While it would be unlawful for the Bureau to fault GCB for failing to provide annually updated certifications in any case, as *no* certifications were required in 2005 (*see infra* Sections I.B and I.C), there also is no substantive basis for that criticism. Where a customer already has certified to its reseller status, there is no reason to believe that the absence of an updated certification the following year makes that representation any less reliable. To the contrary, since GCB typically enters into multi-year contracts, a certification obtained at the outset is overwhelmingly likely to remain valid for the life of the contract.

[34] *See* USAC Audit Report at 4 ("Although Global Crossing received signed USF certifications from resellers . . . .").

[35] *See Second Order on Reconsideration* at App. A (establishing "reasonable expectation" standard). *See also Bureau Order* ¶ 4 (citing *Second Order on Reconsideration* as basis for the standards applied in USAC's audit).

[36] *See infra* Section I.C.

to contribute to universal service—which turns on whether it *reasonably treated* those customers as resellers—to the different question of whether, based on a retrospective review, GCB's wholesale customers *actually contributed* to universal service. The *Bureau Order* leaves no doubt that, because some of GCB's wholesale customers "did not *in fact* contribute to the universal service fund in 2004," USAC reflexively determined that GCB should "report as end-user revenue the revenue from those customers."[37] However, the mere fact that a wholesale customer ultimately did not contribute does not demonstrate that GCB's expectation of payment—based on the nature of the services provided by its wholesale customers—was unreasonable. This obvious logical flaw renders the *Bureau Order* arbitrary and capricious and requires vacatur.

Even assuming that the Bureau did not rely on the fact of nonpayment *alone* as the basis for upholding USAC's audit findings, the Bureau's preoccupation with wholesale customers' satisfaction of their USF contribution obligations infected its entire analysis. In reciting the "reasonable expectation" test, the *Bureau Order* selectively notes that the standard requires a wholesale carrier to "have in place documented procedures to ensure that it reports as reseller revenues only revenues from those entities that reasonably would be expected to contribute to support universal service."[38] Tellingly, the Bureau overlooks the fact that the documented procedures first and foremost are intended to ensure that a wholesale customer "incorporates the purchased telecommunications services into its own offerings"[39]—*i.e.*, that the customer is a *bona fide* reseller. Because the Commission's ***rules*** leave no doubt that resellers have an

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[37] *Bureau Order* ¶ 8 (emphasis added).

[38] *Id.* at ¶ 5.

[39] *Second Order on Reconsideration* at App. A.

unequivocal duty to contribute directly to universal service,[40] determining whether an underlying carrier's wholesale customers would, in fact, resell telecommunications services is the critical inquiry.[41] Indeed, if the wholesale provider appropriately classified its customer as a reseller, then its expectation that such a resale customer would contribute to universal service—*i.e.*, that it would comply with the law—was *per se* reasonable.[42] Yet USAC and the Bureau did not even consider, much less determine, the appropriate classification of GCB's customers: As shown above, the imposition of liability was based on the fact that certain GCB customers did not contribute to the USF, not that GCB mischaracterized those customers as resale carriers.[43]

Rather than weighing the evidence submitted by GCB—which documented the reasonableness of its decisions to treat those customers as resellers—the *Bureau Order* rests on the conclusory assertion that GCB "failed to show that it had actual knowledge or a reasonable expectation that its customers were resellers that would contribute directly to the universal

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[40] *See* 47 C.F.R. § 54.706; *Universal Service First Report and Order* ¶ 787.

[41] While the Bureau notes that a reseller's contribution obligation is independent of the wholesale carrier's obligation to determine the status of, and accurately report revenue from, its customers, *Bureau Order* ¶ 11, it fails to recognize the significance of that statement. GCB's response to the USAC Audit focused entirely on demonstrating that it reasonably determined the status of its wholesale customers. USAC and the Bureau, by contrast, completely ignored the appropriate "status" (or "classification") of the customers at issue. Their approach, which appears intended to offer the administrative convenience of enabling USAC to choose from whom to recover outstanding contributions, cannot be squared with resellers' independent statutory duty to contribute or the prohibition against double recovery. *See infra* Section II.B.

[42] It is well-established that parties may assume that others will comply with their legal obligations. *See, e.g.*, Restatement (Second) of Torts § 290 cmt. n. *See also Henry v. Merck & Co.*, 877 F.2d 1489, 1493 (10th Cir. 1989); *Norris v. Corrections Corp. of Amer.*, 521 F. Supp. 2d 586, 589 n.2 (W.D. Ky. 2007).

[43] This same core defect undermines the *remedy* imposed by USAC and upheld by the Bureau: Absent factual findings that the GCB customers were actually end users, rather than resellers, their contribution obligations cannot be shifted to GCB. *See infra* Section II.

service fund."[44] This *ipse dixit* falls far short of meeting bedrock requirements of the APA.[45] Apart from accusing GCB of failing to satisfy *ultra vires* requirements set forth in the 2007 Instructions,[46] the *Bureau Order* offers no hint as to why GCB's expectations were unreasonable.[47]

B. The Bureau and USAC Appear To Have Applied the *2007* Instructions in Clear Violation of Law.

Notwithstanding the flexible and discretionary nature of the "reasonable expectation" standard applicable in 2005, the USAC Audit Report and the *Bureau Order* strongly suggest that GCB's evidence was rejected based on the bright-line requirements imposed by revisions to the instructions that first appeared in 2007. The Bureau's retroactive application of such requirements, even assuming they were validly promulgated in 2007, is plainly impermissible.

Absent express statutory authorization, agencies—including the Commission and USAC—may apply changes to its rules and policies only prospectively.[48] Agencies are free to modify existing regulations and adopt new rules or policies when such revisions are not arbitrary

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[44] *Bureau Order* at ¶ 11.

[45] *See, e.g., Illinois Pub. Telecomm. Ass'n v. FCC*, 117 F.3d 555, 564 (D.C. Cir. 1997) ("The FCC's *ipse dixit* conclusion, coupled with its failure to respond to contrary arguments resting on solid data, epitomizes arbitrary and capricious decisionmaking."). *See also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 420-21 (1971) (requiring an agency to demonstrate careful consideration of all "relevant factors" and to provide a reasoned explanation of the basis and rationale for its decision).

[46] *See infra* Section II.B.

[47] The Bureau's failure to engage in any substantive analysis of the pivotal issues also violates its independent obligation to conduct a *de novo* review of USAC's audit findings. 47 C.F.R. § 54.723(a). Indeed, as demonstrated, USAC's and the Bureau's assertions reduce to the unjustified and unjustifiable proposition that, because GCB's customers did not contribute, that obligation falls on GCB.

[48] *See* 5 U.S.C. § 551(4) (defining "rule" by reference to "future effect"). *See also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988).

and capricious, but those revisions may not alter "the *past* legal consequences of past actions,"[49] "render[] past actions illegal or otherwise sanctionable,"[50] or "impair[] rights a party possessed when [it] acted, increase[] a party's liability for past conduct, or impose[] new duties with respect to transactions already completed."[51] The Commission has consistently acknowledged these inherent limitations on its authority.[52]

Despite such well-recognized constraints, the *Bureau Order* readily acknowledges that, in reviewing GCB's revenue worksheets, USAC did not limit itself to inquiring whether GCB recorded the "minimum information on each customer" and whether it had additional (unspecified) evidence to support treating such customers as resellers, as the 2005 Instructions and the "reasonable expectation" standard contemplate.[53] Rather, USAC examined whether GCB "had a valid reseller certification from each of its customers" and whether it "had a printout from the Commission's current contributor website verifying the reseller contributor status of each of its customers."[54] As explained above, it was not until *2007* that the FCC Form 499-A

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[49] *Bowen*, 488 U.S. at 219 (Scalia, J., concurring) (emphasis in original).

[50] *See Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009).

[51] *Chadmoore Communications v. FCC*, 113 F.3d 235, 240 (D.C. Cir. 1997) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

[52] *See, e.g., Teleport Communications Atlanta v. Georgia Power*, Order on Review, 17 FCC Rcd 19859, at ¶ 20 (2002) (finding an alternate basis for a Bureau decision in recognition that it could not rely upon a later-issued Order supporting the same finding); *AT&T v. MCI*, Memorandum Opinion and Order, 7 FCC Rcd 807, at ¶ 13 n.26 (1992) (interpreting *Bowen* to prevent retroactive application of a new standard, especially where a preexisting interpretive rule was in effect).

[53] *Bureau Order* ¶ 14.

[54] *Id.* At the time, the Commission did not require wholesale carriers to obtain reseller certifications, much less annual certifications. Rather, the Commission had explicitly declined to impose any such annual certification requirement in an analogous context. *See Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996,* Third Report and Order and Second Order on Reconsideration, 15 FCC Rcd 15996, at ¶ 65

instructions (leaving aside actual Commission rules) required contributors to comply with these concrete measures in all cases, regardless of what other bases they might have to support treating a customer as a reseller. Far from requiring a "current and properly executed reseller certification,"[55] the 2005 Instructions did not even *recommend* a reseller certification (of any vintage) in circumstances where the wholesale carrier had an "independent reason" to believe its customer was a reseller.[56] By the same token, no provision of law applicable in 2005 required contributors to obtain a printout from the Commission's website revealing its wholesale customer's current contributor status.[57] USAC's and the Bureau's insistence on compliance with these *ultra vires* factors constitutes clear error.[58]

(2000). In any event, GCB obtained certifications in many cases, only to have them dismissed as "outdated." *Bureau Order* ¶ 14.

[55] *Id.* at ¶ 13.

[56] 2005 Instructions at 18. As explained above, *see supra* Section I.A, the Bureau's criticism of GCB's "outdated certifications," *Bureau Order* ¶ 14, is doubly mistaken, as GCB was not required to obtain a reseller certification from each customer, much less an annually updated certification.

[57] As explained above, *see supra* Section I.B, the Bureau's summary rejection of GCB's reliance on "contract provisions, company website information and product description[s]," *Bureau Order* ¶ 14, likewise ignores the standard that applied in 2005.

[58] There are at least two independent reasons why there can be no argument that these objective factors were *implicitly* required under the 2005 Instructions. First, the plain text of the 2005 Instructions confers discretion on wholesale carriers to support a "reasonable expectation" with a wide variety of evidentiary bases, expressly making factors such as reseller certifications optional. 2005 Instructions at 18. Second, if annual certifications and website were mandatory all along (notwithstanding the hortatory language in the 2005 Instructions), there would have been no need to amend the FCC Form 499-A instructions in 2007. Indeed, if the 2007 Instructions did not reflect a change in policy, the 2005 Instructions and the standards set forth therein were sufficiently vague as to deny due process and require a more definitive statement of the Commission's expectations. *See, e.g., Hastings v. Judicial Conference of the U.S.*, 829 F.2d 91, 105 (D.C. Cir. 1987).

C. Interpreting the 2005 Instructions To Require GCB To Meet the Regulatory Obligations Imposed by USAC Would Violate the APA.

While the *Bureau Order* leaves little doubt that USAC and the Bureau improperly gauged GCB's compliance based on standards embodied in the 2007 Instructions, the *Bureau Order* would be no more valid if those standards were deemed implicit in the 2005 version. As of 2005, the Commission had not promulgated a rule in conformity with the APA requiring annual certifications or website printouts, making those requirements unenforceable even if they were not retroactively applied.

In implementing Section 254(d) of the Act, the Commission explicitly ruled, pursuant to notice-and-comment rulemaking procedures, that resellers are obligated to contribute to the USF, and that wholesale providers that sell telecommunications services to resellers may rely on the "carrier's carrier" exception in reporting revenues. In contrast, nothing in the Commission's implementing orders indicates that the Commission intended to conscript wholesale carriers to enforce reseller contribution obligations, or to require wholesalers to satisfy specific procedural requirements in order to qualify for the "carrier's carrier" exception. At most, those orders—and the 1997 Instructions—required wholesale carriers to take reasonable steps to ensure that revenue was not classified incorrectly.

The imposition of specific regulatory obligations on wholesale carriers (including the need to obtain annual reseller certificates and printouts confirming current contributions) would represent a substantial change in Commission policy requiring, at a minimum, the initiation of a new rulemaking proceeding.[59] In particular, the Commission would have been required to publish at least a "[g]eneral notice" regarding such changes in the Federal Register and to afford

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[59] *See, e.g.*, *Sprint Corp. v. FCC*, 315 F.3d 369, 374-77 (D.C. Cir. 2003) (holding that Commission pronouncements that alter a party's substantive obligations must be adopted pursuant to notice-and-comment procedures).

regulated entities a meaningful opportunity to comment on the substance of the notice.[60] Thus, to the extent that the Bureau is claiming that the standards embodied in the 2007 Instructions were somehow imposed before 2005 (leaving aside the failure to explain how or when that occurred),[61] the imposition of such standards would run afoul of the APA's procedural strictures, and such "requirements" could not be given effect.[62]

The *Bureau Order* responds that there was no APA violation because USAC did not treat the 2005 Instructions as a rule, but rather "considered evidence provided by Global Crossing, [and] found that evidence wanting."[63] To the contrary, neither USAC nor the Bureau performed any meaningful review of the record evidence submitted by GCB. As shown above, USAC found GCB strictly liable *without* considering the evidence it presented regarding its treatment of particular customers as resellers, and the Bureau committed the same error. Merely stating otherwise does not change the fact that there was never any review of the record evidence or APA-compliant explanation of why, notwithstanding the broad and flexible "reasonable expectation standard," such evidence was deemed "wanting."

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[60] 5 U.S.C. § 553(b).

[61] *See, e.g.*, *Bureau Order* ¶ 13 (citing 2005 Instructions for the proposition that "a wholesale carrier can substantiate its reasonable expectation regarding the status of a customer by retaining a current and properly executed reseller certification," even though the Instructions did not require certifications at all, much less a "current" version).

[62] *See Sprint Corp.*, 315 F.3d at 374.

[63] *Bureau Order* ¶ 16.

II. THERE IS NO FACTUAL OR LEGAL BASIS FOR SHIFTING WHOLESALE CUSTOMERS' CONTRIBUTION OBLIGATIONS TO GCB

A. The *Bureau Order* Unjustifiably Requires GCB To Make Back Payments to the Universal Service Fund Absent a Fact-Based Determination That GCB Improperly Classified any Wholesale Customers as Resellers.

As shown above, USAC and the Bureau relied on impermissible grounds in finding that GCB failed to establish a "reasonable expectation" that its wholesale customers would contribute to universal service—namely, the mere fact that certain wholesale customers failed to contribute for calendar year 2004, coupled with GCB's failure to comply with standards imposed two years after the fact. Even if that liability finding were justified, it could not warrant shifting resellers' contribution obligations to GCB absent a determination, based on record evidence, that the wholesale customers at issue were not *bona fide* resellers. Regardless of whether GCB's wholesale customers "in fact contribute[d] to the universal service fund in 2004,"[64] and regardless of whether GCB "had a valid reseller certification" and "printout from the Commission's current contributor website" from each of its customers,[65] the fact remains that if the customers at issue actually were resellers, they had an unequivocal duty to contribute to universal service.[66] That contribution obligation cannot be shifted to GCB unless its wholesale customers were not required to make USF contributions based on the nature of their service offerings.

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[64] *Id.* at ¶ 8.

[65] *Id.* at ¶ 14.

[66] The Commission's long enforcement history with respect to non-paying resellers underscores this point. *See, e.g., Globcom, Inc.*, Order of Forfeiture, 21 FCC Rcd 4710 (2006); *Carrera Communications, LP*, Notice of Apparent Liability for Forfeiture and Order, 20 FCC Rcd 13307 (2005); *Inphonic, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 20 FCC Rcd 13277 (2005).

USAC and the Bureau effectively seek to apply an unrebuttable presumption that all non-contributing customers must be automatically and irreversibly be treated as end users, even if they are not. This presumption is not supported by law or fact. Where a customer fails to contribute to the USF, two possible explanations exist: Either the customer is an end user with no obligation to contribute, or the customer is a reseller that failed to meet its own contribution obligations, as routinely occurs in the resale marketplace. Therefore, it simply does not follow from the fact of non-payment by one or more of GCB's customers that they *actually* operated as end users (which, in turn, would justify requiring GCB to contribute based on the sale of telecommunications services to such entities). Nor would a failure to obtain current reseller certificates or to consult the Commission's current contributor website justify such vicarious liability absent evidence that GCB improperly classified its wholesale customers.

The *Bureau Order* points to the 2005 Instructions to justify this strict liability approach, claiming that a carrier's failure to "provide evidence to demonstrate its reasonable belief that its customers were resellers that would directly contribute to the universal service fund" automatically results in revenue from those customers being deemed "end-user revenue."[67] Even apart from the fact that GCB *did* provide such evidence, neither the 2005 Instructions nor, more importantly, the Commission's rules, support this assertion. What the 2005 Instructions actually state is that a wholesale provider will be responsible for "additional universal service assessments that result *if* its customers *must be reclassified* as end users."[68]

USAC and the Bureau skipped the essential step, failing even to inquire (let alone determine) whether the non-paying customers GCB treated as resellers "must be reclassified as

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[67] *Bureau Order* ¶ 12 (citing 2005 Instructions); *see also id.* ¶ 14.

[68] 2005 Instructions at 18 (emphasis added).

end users."[69] Such a classification decision is an inherently fact-intensive question that turns on the functional nature of the service provided by each wholesale customer at issue.[70] If it turns out that a GCB customer was providing information services, then it *must be* reclassified as an end user, and GCB would be properly subject to additional contribution obligations. But where the facts confirm that GCB's customers were *bona fide* resellers—as GCB's evidence demonstrates was the case—then they *cannot* be reclassified simply because USAC finds fault with GCB's procedures or considers it more convenient to collect from the underlying wholesale carrier.[71] Because the *Bureau Order* reclassifies GCB's wholesale customers as end users without any evidentiary basis or fact-based explanation whatsoever, it is arbitrary and capricious and must be vacated.[72] Indeed, the fact that USAC not only shifted resellers' contribution obligations without a factual basis, but refused to consider GCB's carefully compiled evidence

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[69] The *Bureau Order* includes the isolated assertion that USAC determined that "Global Crossing had not properly classified the revenue at issue as reseller revenue." *Bureau Order* ¶ 14. But USAC made no such finding regarding the appropriate classification of GCB's customers. Rather, as the *Bureau Order* elsewhere acknowledges, USAC steadfastly refused to consider whether particular customers were properly classified as resellers, relying instead on the unrelated facts that (i) certain customers failed to contribute and (ii) GCB did not obtain annual certificates and consult the Commission's current contributor website. *See id.* at ¶¶ 8, 12, 14.

[70] *Cf. Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, at ¶ 38 (2002); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking 20 FCC Rcd 14853, at ¶¶ 8-12 (2005) (classifying cable modem and wireline broadband Internet access services as information services based on a careful parsing of the functional nature of these services).

[71] *See Illinois Pub. Telecomm. Ass'n*, 117 F.3d at 565 (rejecting shifting of payment obligations based on "administrative convenience").

[72] *See, e.g., Ctr. for Auto Safety v. FHA*, 956 F.2d 309, 313 (D.C. Cir. 1992); *Am. Trading Transp. Co. v. United States*, 791 F.2d 942, 949 n.10 (D.C. Cir. 1986) (noting that conclusions drawn from "assumption[s] based on no evidence would rank as arbitrary and capricious under the Administrative Procedure Act").

regarding the nature of particular customers' services, makes the APA violation even more pronounced.[73]

B. The Bureau's Imposition of Strict Liability on GCB Is Inconsistent with Section 254(d) of the Act.

In addition to violating the APA, holding GCB responsible for its customers' contribution obligations without any finding that they actually operated as end users runs afoul of Section 254(d). As discussed above, it is well-established that all telecommunications carriers, including resellers, have an obligation to contribute to the USF under Section 254(d) of the Act and the Commission's implementing rules.[74] Notably, under Section 254(d) the Commission may exempt a carrier from its contribution obligation only under very narrow circumstances—where the Commission concludes that "the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis."[75] The Commission is not empowered to exempt carriers for any other reason—a fact that the Commission itself recognized in implementing the Act.[76]

To the extent that GCB's nonpaying customers were *bona fide* resellers, as GCB believes, forcing GCB to contribute on their behalf would run afoul of the mandatory contribution provision in Section 254(d) if it resulted in exempting such resellers from

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[73] *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (concluding that an agency's action should be set aside if it "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency"); *Overton Park*, 401 U.S. at 416, 420-21 (requiring an agency to demonstrate careful consideration of all "relevant factors").

[74] *See* 47 U.S.C. § 254(d); 47 C.F.R. § 54.706(a)(16).

[75] 47 U.S.C. § 254(d).

[76] *See Universal Service First Report and Order* ¶ 787 (declining to "exempt from contribution any of the broad classes of telecommunications carriers that provides interstate telecommunications services . . . because the Act requires 'every telecommunications carrier that provides interstate telecommunications services' to contribute to the support mechanisms.").

contributing directly.[77] Moreover, shifting the contribution obligation in this fashion could compel the wholesale carrier to shoulder a funding obligation disproportionate to its share of interstate and international end-user revenues, contrary to Section 254(d)'s mandate that every carrier contribute to the fund on an "equitable" basis.[78]

In contrast to the Bureau's attempt to make GCB the guarantor of resellers' contribution obligations, the Commission has acknowledged in other circumstances that shifting obligations among parties is impermissible. As the Commission has recognized, a carrier may not use contractual or related measures to shift its contribution obligation to another party (*e.g.*, from a reseller to a wholesaler).[79] Had USAC simply conducted a factual inquiry into the proper classification of each wholesale customer at issue, it could have assigned liability to the appropriate party in each case without creating any problem under Section 254 or the Commission's rules.

C. The Bureau's Imposition of Strict Liability on GCB Also Raises Significant Questions under the Due Process Clause of the Fifth Amendment.

Finally, the Bureau's imposition of liability without a factual basis for treating GCB's customers as end users raises grave concerns under the Due Process Clause. In *Matthews v. Eldridge*, the Supreme Court established a three-part balancing test for determining what process

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[77] If GCB began shouldering a reseller's contribution obligation pursuant to the USAC Audit Report and the reseller resumed paying directly the following year, thus resulting in double payment, that would be no more justifiable than improperly exempting the reseller. *See Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1244 (D.C. Cir. 2007) (finding scheme requiring duplicative contributions from interconnected VoIP providers and their underlying wholesale carriers invalid).

[78] 47 U.S.C. § 254(d).

[79] *See American Telecommunication Systems, Inc.*, 22 FCC Rcd 5009, at ¶ 12 (2007) (precluding resellers from shifting obligation to wholesalers through contract).

is due before an administrative agency may take official action adverse to a party.[80] The Court held that "identification of the specific dictates of due process" requires consideration of: (i) the private interest that will be affected by the official action; (ii) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and (iii) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[81] Each factor creates a serious risk of violating GCB's constitutional rights in these circumstances.[82]

First, the private interest affected by the *Bureau Order* is substantial. The USAC Audit Report resulted in the shifting of nearly $5.6 million of contribution obligations from GCB's wholesale customers to GCB. Because GCB had a reasonable belief that these customers were properly treated as resellers subject to their own payment obligations, the associated contribution burden was not reflected in GCB's pricing or otherwise passed along to GCB's customers. Consequently, GCB risks bearing this significant burden without any opportunity to recover its costs unless the *Bureau Order* is reversed.

Second, as demonstrated above, given the failure of both USAC and the Bureau to conduct *any* inquiry into whether the GCB customers at issue actually were resellers, there is a

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[80] 424 U.S. 319 (1976).

[81] *Id.* at 334-35.

[82] It is well-established that interpretations posing a serious risk of violating the Constitution must be set aside where, as here, constitutionally permissible interpretations of the operative rules exist. *See Chamber of Commerce of the United States v. FEC*, 69 F.3d 600, 604-05 (D.C. Cir. 1995) (declining to defer to FEC's interpretation of statute giving rise to grave First Amendment concerns); *see also Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

considerable risk that GCB is being compelled to shoulder contribution obligations that should be borne by its customers under the Act.

Finally, both the Act and the Commission's rules make clear that the government's primary interest is in ensuring that *all* telecommunications carriers with interstate or international end-user revenues—including resellers—contribute on an equitable and non-discriminatory basis to universal service. Vindicating that interest favors *more*—not *less*—process. This is particularly the case as either USAC or the Bureau could have afforded additional process without assuming significant fiscal or administrative burdens.

CONCLUSION

USAC and the Bureau held GCB strictly liable for unpaid contributions owed by GCB's resale customers in violation of the APA, the Communications Act, and the Due Process Clause. The mere fact that GCB's wholesale customers failed to contribute says nothing about whether they were properly classified as resellers or instead should have been reclassified as end users. That is an entirely separate question of fact that was never asked by the Bureau or USAC, much less answered based on a review of the record evidence submitted by GCB. The utter lack of an evidentiary basis to impose vicarious liability on GCB requires vacatur of the *Bureau Order* and the underlying USAC Audit Report.

Respectfully submitted,

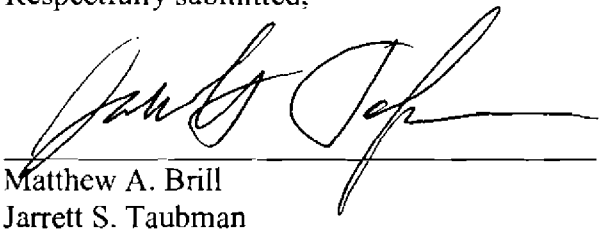

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EXHIBIT A

Changes from 2005 to 2007 Instructions to FCC Form 499-A

Each filer should have documented procedures to ensure that it reports as "revenues from resellers" only revenues from entities that reasonably would be expected to contribute to support universal service. The procedures should include, but not be limited to, maintaining the following information on resellers: Filer 499 ID; legal name; address; name of a contact person; ~~and~~ phone number of the contact person**; and, as described below, the annual certification by the reseller and evidence of the filer's use of the FCC's website to validate the contributor status of the reseller**. Filers shall provide this information to the Commission or the Administrator upon request. ~~The filer should verify that each reseller will: 1) resell the filer's services~~

Each year, the filer must obtain a signed statement from the reseller containing the following language:

> **I certify under penalty of perjury that my company is purchasing service for resale** in the form of telecommunications ~~[and not as information services]; and 2) contribute~~**or interconnected Voice over Internet Protocol service. I also certify under penalty of perjury that either my company contributes** directly to the federal universal **support mechanisms, or that each entity to which I provide resold telecommunications is itself an FCC Form 499 worksheet filer and a direct contributor to the federal universal** service support mechanisms. ~~If the filer does not have independent reason to know that the reseller satisfies these criteria, it should obtain a signed statement certifying that these criteria are met. Current~~

In addition, to facilitate verification of a reseller's certification, current contributors to universal service are identified at http://gullfoss2.fcc.gov/cib/form499/499a.cfm. ~~Filers will~~ **Filers may use the website to verify the continuing validity of a reseller's certification, and may presume that any reseller identified as a contributor in this website in the month prior to an FCC Form 499-Q filing will be a contributor for the coming quarter, and that it was a contributor for all prior quarters during that calendar year. Filers that do not comply with the above procedures will** be responsible for any additional universal service assessments that result if its customers must be reclassified as end users.